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IN THE  
**SUPREME COURT OF THE UNITED STATES**

Supreme Court, U.S.  
FILED

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No. 70-5122

DENNIS STEPHEN DUNCAN,  
Petitioner,

v.  
STATE OF TENNESSEE,  
Respondent.

On Writ of Certiorari to the Supreme Court of Tennessee

**BRIEF FOR THE RESPONDENT**

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**BRIEF FOR THE RESPONDENT**

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**OPINION BELOW**

The opinion of the Supreme Court of Tennessee was entered and filed on October 5, 1970, and is reported as **State v. Brooks**, ... Tenn. ..., 462 S.W.2d 491 (1970). A correct copy of this opinion is included in the appendix. (Appx. 48-53). The opinion of the Supreme Court of Tennessee on the Petitioner's petition to rehear was entered and filed on January 18, 1971; and is also reported in **State v. Brooks**, *supra*. A correct copy of this opinion is incorporated in the appendix. (Appx. 54-55). A copy of the judgment pursuant to the opinions is also included in the appendix. (Appx. 56).

## JURISDICTION

The jurisdictional requisites are adequately set forth in the brief of the Petitioner.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST., amend. V.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. CONST., amend. XIV.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

TENN. CONST., art. I, sec. 10.

"That no person shall, for the same offense, be twice put in jeopardy of life or limb."

TENN. CODE ANN., sec. 39-3901.

"Robbery is the felonious and forcible taking from the person of another, goods or money of any value, by violence or putting the person in fear. Every person convicted of the crime of robbery shall be imprisoned in the penitentiary not less than five (5) nor more than fifteen (15) years; provided, that if the robbery be accomplished by the use of a deadly weapon the punishment shall be imprisonment for life or for any period of time not less than ten (10) years."

**QUESTIONS PRESENTED**

The Respondent is dissatisfied with the Petitioner's presentation of the questions involved and, therefore, pursuant to Rule 40(3) of the Supreme Court Rules, presents the questions as follows:

- (1) Whether the strict application of the same evidence test to determine identity of offenses violated the Petitioner's Fifth Amendment right not to be twice placed in jeopardy for the same offense.
- (2) Whether the Respondent was collaterally estopped from reindicting and trying the Petitioner by the federal rule of collateral estoppel embodied in the Fifth Amendment guaranty against double jeopardy.

**STATEMENT OF THE CASE**

The Petitioner, Dennis Stephen Duncan, was jointly indicted with one Richard A. Brooks, by the Grand Jury of Montgomery County, Tennessee, on August 28, 1968, for robbery accomplished by the use of a deadly weapon, to-wit: a gun, to-wit: a .22 calibre rifle, in connection with the robbery of one Johnny Bryant, an employee of the Red Ace Petroleum Company. (Appx. 7).

On December 20, 1968, the Petitioner and his co-defendant entered pleas of former jeopardy, asserting that they had been previously put to trial upon an indictment charging that they robbed one Johnny Bryant of money belonging to the Red Ace Petroleum Company by the use of a deadly weapon, to-wit: a gun, to-wit: a pistol. The Petitioner contended that after the first state's witness was called and testified that a .22 calibre rifle was used in the robbery the State moved for a directed verdict of acquittal on the ground that the indictment was in error. The verdict was rendered accordingly, the Petitioner excepting thereto. (Appx. 9-11). On February 10, 1969, the Petitioner amended his plea alleging a violation of his federal constitutional rights. (Appx. 12). On March 18, 1969, the State having answered the plea, the trial judge denied the Petitioner's plea after a hearing. The Petitioner's trial then began in the Criminal Court of Montgomery County, Tennessee, the Honorable William O. Beach, Judge, presiding. The Petitioner, represented by counsel, entered a plea of not guilty. (Appx. 14-15). On March 19, 1969, after hearing all the evidence adduced in the case and after receiving instructions from the trial judge, the jury returned a verdict of guilty of armed robbery and fixed punishment at confinement in the penitentiary for a period of ten years. (Appx. 16-17).

On March 27, 1969, the Petitioner filed a motion for a new trial, which was overruled on April 4, 1969, after a hearing. The Petitioner perfected an appeal to the Court of Criminal Appeals of Tennessee and assigned as error, inter alia, the trial judge's denial of his plea of former jeopardy. The appeal was heard at the October, 1969 term of the Court of Criminal Appeals. On March 4, 1970, the Court of Criminal Appeals, one judge dissenting, reversed the Petitioner's conviction and discharged the Petitioner on the ground that the Petitioner had been twice tried for the same offense. (Appx. 21-22, 23-43). The Supreme

Court of Tennessee granted the Respondent's Petition for Writ of Certiorari seeking review of the opinion and judgment of the Court of Criminal Appeals of Tennessee entered March 4, 1970. In an opinion filed in October 5, 1970, the Supreme Court of Tennessee reversed the judgment of the Court of Criminal Appeals and affirmed the judgment of the trial court. (Appx. 48-53). On January 18, 1971, the Supreme Court of Tennessee, in a written opinion, denied the Petitioner's Petition to Rehear the case. (Appx. 54-55).

## ARGUMENT

I

**The Same Evidence Test for Determining Identity of Offenses as Developed and Applied in Tennessee Is Consistent With Federal Standards for Determining Former Jeopardy; Therefore, the Strict Application of That Test to the Petitioner's Case Did Not Violate His Federal Constitutional Rights Under the Fifth and Fourteenth Amendments.**

Both the Constitutions of the United States and of the State of Tennessee provide that no person shall be twice put in jeopardy of life or limb for the same offense. U.S. CONST., amend. 5; TENN. CONST., art. 1, sec. 10. Jeopardy is generally considered as attaching "when the accused is put upon trial before a court of competent jurisdiction, upon an indictment sufficient in form and substance to sustain a conviction, and the jury has been impaneled and sworn." **Etter v. State**, 185 Tenn. 218, 222, 205 S.W.2d 1, 3 (1947). See generally **Green v. United States**, 355 U.S. 184 (1957). Since the constitutional provisions against double jeopardy prohibit subsequent jeopardy only for the same offense, the question is presented concerning what constitutes identity of offenses such as will entitle a defendant to maintain a plea of former jeopardy.

The Supreme Court of Tennessee had an early opportunity to consider this question in the leading Tennessee case of **Hite v. State**, 17 Tenn. 357 (1836). In that case the defendant was first indicted for the larceny of a bank note payable on demand at the Merchants and Traders' Bank of New Orleans. After having been acquitted of that charge, the defendant then was indicted for the larceny of a bank note payable on demand at the Mechanics and Traders' Bank of New Orleans. The Court held that

the offenses were not legally identical in that a note payable at the Mechanics and Traders' Bank was different than one payable at the Merchants and Traders' Bank. The Court then established the test by which the sufficiency of the plea of former jeopardy is to be tried:

"... whenever the same evidence will support both indictments, it is a good plea; and that, unless the first indictment were such that the prisoner might have been convicted upon it by proof of the facts contained in the second indictment, an acquittal on the first is not a bar." *At Tenn.* at 364.

A corollary to the same evidenee test is the rule requiring conformity between averments contained in an indictment and the proof presented at the trial. Under this rule a material variance between the proof and the averments in the indictment is considered fatal to the prosecution, a material variance being a disagreement as to some matter which is legally essential to the charge.<sup>1</sup> See 5 WHARTON'S CRIMINAL LAW AND PROCEDURE § 2054 (1957). Where there is a material variance with respect to an indictment with the result that a conviction could not be sustained on the evidence due to the variance, then a second indictment which contains charges in conformity with such evidence does not charge an identical offense since the same evidence will not support both indictments.

The Supreme Court of Tennessee has uniformly adhered to a strict rule requiring conformity between averments

<sup>1</sup> In **Arnold v. United States**, 336 F.2d 347, 352 (9th Cir. 1964), it is said that "the rule requiring that allegations and proof must correspond is based on two requirements: (1) that the accused shall be definitely informed as to the charges against him so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense." See also **Berger v. United States**, 295 U.S. 78 (1935); **Bennett v. United States**, 227 U.S. 333 (1912).

contained in an indictment and the proof presented at the trial, holding that where a person or thing required to be mentioned in an indictment is described with greater particularity than is necessary, the proof must conform to the greater particularity of the averred description. Substantial variances between such averments and the proof are deemed material variances. For example, in **Young v. State**, 185 Tenn. 596, 206 S.W.2d 805 (1947), two defendants were first indicted for housebreaking and larceny, the premises being described in the indictment as the business house of a named individual and the stolen property described as that belonging to that individual. At the trial it developed that the business house and the property were that of a corporation of which the individual was a stockholder. A verdict of not guilty was returned. A second indictment was returned against the defendant properly describing the premises and the property, although the premises and the property were admittedly the same as that in the first indictment. The Tennessee Supreme Court held that a material variance in the name of the owner of stolen property in a larceny indictment is fatal, and that where there is a material variance between the averments in the two indictments, the two prosecutions are separate as a matter of law. A similar holding was reached in the case of **Wilson v. State**, 200 Tenn. 309, 292 S.W.2d 188 (1956), which upheld the overruling of a plea of former jeopardy where the defendant was first indicted for the theft of brass rollers and later indicted for the theft of bronze rollers.

In view of this Honorable Court's holding in **Benton v. Maryland**, 395 U.S. 784 (1969), which overruled **Palko v. Connecticut**, 302 U.S. 319 (1937), and applied federal double jeopardy standards to the states through the Fourteenth Amendment, the question is presented as to whether the same evidence test for identity of offenses as applied in Tennessee meets federal standards.

Federal double jeopardy standards do not prohibit successive prosecutions for offenses which are not the same. **United States v. Lowell**, 383 U.S. 116 (1966). In determining identity of offenses for double jeopardy purposes, the federal courts have applied the same evidence test. For example, in **Morgan v. Devine**, 237 U.S. 632 (1915), this Honorable Court recognized the same evidence test in the context of determining whether the same transaction constituted more than one offense, holding that a defendant has been in jeopardy if on the first charge he could have been convicted of the offense charged in the second proceeding.<sup>2</sup> See also **Ebeling v. Morgan**, 237 U.S. 625 (1915); **Gavieres v. United States**, 220 U.S. 338 (1911). See generally, **United States v. DeMarrias**, 441 F.2d 1304 (8th Cir. 1971); **Harris v. United States**, 402 F.2d 205 (D.C. Cir. 1968); **United States v. Friedland**, 391 F.2d 378 (2d Cir. 1968); **United States v. Bruni**, 359 F.2d 807 (7th Cir. 1966), cert. den., 395 U.S. 826; **Arnold v. United States**, 336 F.2d 347 (9th Cir. 1964); **Salta v. United States**, 44 F.2d 752 (1st Cir. 1930). The lower federal courts have also recognized the material variance criterion in applying the same evidence test. In **United States v. Hunter**, 123 F.Supp. 1 (D. Md. 1954), a variance in the serial number of a stolen automobile was deemed material, and a motion to dismiss a second indictment bearing the correct serial number was denied.

In view of the recognition of the same evidence test in the federal courts, the Respondent maintains that its application in Tennessee meets federal standards.

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<sup>2</sup> In addition to its holding in **Morgan v. Devine**, 237 U.S. 632 (1915), this Honorable Court has used the same evidence test to determine whether the same act or transaction constitutes more than one offense in subsequent cases. E.g., **Blockburger v. United States**, 284 U.S. 299 (1932). See also **Gore v. United States**, 357 U.S. 386 (1958). However, in **Abbate v. United States**, 359 U.S. 187, 198 (1959), there is language suggesting that this Honorable Court has not actually sanctioned the same evidence test except in cases where consecutive sentences were imposed on conviction of several offenses at one trial.

In the instant case the Petitioner was indicted and tried for the offense of robbery accomplished by the use of a deadly weapon. The Tennessee statute pertaining to robbery—TENN. CODE ANN., sec. 39-3901—provides:

“Robbery is the felonious and forcible taking from the person of another, goods or money of any value, by violence or putting the person in fear. Every person convicted of the crime of robbery shall be imprisoned in the penitentiary not less than five (5) nor more than fifteen (15) years; provided, that if the robbery be accomplished by the use of a deadly weapon the punishment shall be imprisonment for life or for any period of time not less than ten (10) years.”

Since the difference between the first and second indictments against the Petitioner was the description of the deadly weapon used to accomplish the robbery, the question presented to the Tennessee courts was whether the offenses charged in the indictments were identical which would entitle the Petitioner to maintain a plea of former jeopardy. The Supreme Court of Tennessee applied the same evidence test first articulated in its leading case of **Hite v. State**, 17 Tenn. 357 (1836), and found that the variance in the description of the deadly weapon averred in the indictments was a material variance; with the result that the same evidence would not support both indictments. Proof of the weapon (rifle) averred in the second indictment was not admissible as evidence under the first indictment which averred a pistol, and a conviction for robbery accomplished with a deadly weapon could not be sustained under the first indictment. Thus, the offenses were not identical under the same evidence test.

It is contended by the Petitioner that under the Tennessee robbery statute<sup>3</sup> the use of a deadly weapon merely aggravates the offense of robbery, **State ex rel. Anderson**

<sup>3</sup> TENN. CODE ANN., sec. 39-3901.

v. Winsett, 217 Tenn. 564, 399 S.W.2d 741 (1964), and that, therefore, a material variance in the type of weapon used would not constitute a material variance with respect to the offense of robbery itself, but merely to the means of aggravation. The Supreme Court of Tennessee in construing Tennessee's robbery statute with respect to the Petitioner's contention resolved this issue against the Petitioner. (Appx. 52). Moreover, the Respondent would make two additional observations with respect to this contention. First, the Petitioner in his first trial asserted that the variance in the description of the weapon used was material when he based his objection to the introduction of evidence on the variance. See generally **Salta v. United States**, 44 F.2d 752 (1st Cir. 1930); **United States v. Hunter**, 123 F.Supp. 1 (D. Md. 1954). Second, to bring an accused under the increased penalty provisions of the Tennessee robbery statute a distinct and separate allegation is required in the indictment. **State ex rel. Anderson v. Winsett**, 217 Tenn. 564, 399 S.W.2d 741 (1964).

The Respondent respectfully submits that the offenses charged in both indictments were not identical under federal standards and that, therefore, the Petitioner was not denied his constitutional right not to be twice placed in jeopardy for the same offense.

## II

The Federal Rule of Collateral Estoppel Embodied in the Fifth Amendment Guaranty Against Double Jeopardy Did Not Bar Respondent From Trying Petitioner Under a Second Indictment Where the Offense Charged in the First Indictment Was Not Identical Under the Same Evidence Test and Where the Controlling Factual Issues Had Not Been Resolved.

In the recent case of **Ashe v. Swenson**, 397 U.S. 436 (1970), this Honorable Court overruled **Hoag v. New Jer-**

sey, 356 U.S. 464 (1958), and applied the federal rule of collateral estoppel, as embodied in the Fifth Amendment guaranty against double jeopardy, to the states. Thus, the question is presented as to whether the Respondent was estopped from trying the Petitioner under the second indictment.

The Respondent contends that the holding in **Ashe v. Swenson**, *supra*, does not require a reversal of the Petitioner's criminal conviction. In **Ashe** the petitioner had been acquitted of robbing one of six poker players, apparently on the issue of identity. In a subsequent trial for robbing another of the poker players, Ashe was convicted, the evidence regarding his identity as the robber being somewhat stronger. In reversing Ashe's conviction, this Honorable Court applied the rule of collateral estoppel and said that:

"The question is not whether Missouri could validly charge the petitioner with six separate offenses for the robbery of the six poker players. It is not whether he could have received a total of six punishments if he had been convicted in a single trial of robbing the six victims. It is simply whether, after a jury determined by its verdict that the petitioner was not one of the robbers, the State could constitutionally hail him before a new jury to litigate that issue again."

391 U.S. at 446

In a recent decision, the United States Court of Appeals for the Sixth Circuit suggested that the holding in **Ashe** was actually quite narrow. **Pulley v. Norvell**, 431 F.2d 258 (6th Cir. 1970). In that case the Court upheld the imposition of two consecutive sentences on a petitioner who had been convicted of robbing two persons on the same occasion. **Ashe** was distinguished, the Court saying:

"We construe **Ashe** to recognize a distinction between a case where the defendant is convicted in a trial of

one crime against A and trial two of a crime occurring the same time against B, and the situation where at the first trial one of defendants is acquitted of a crime against A under circumstances that the defendant's presence or absence at the scene of the crime is resolved in favor of the accused."

431 F.2d at 261

In the instant case the controlling factual issues were not decided in the Petitioner's first trial. The only issue resolved therein was that the weapon used to accomplish the robbery was not a pistol. Thus, Respondent contends that the rule of collateral estoppel as applied in *Ashe* did not bar Respondent from trying Petitioner under a new indictment charging him with robbery with a rifle.

### **CONCLUSION**

For the foregoing reasons, Respondent, State of Tennessee, respectfully submits that the Petitioner's constitutional rights under the Fifth and Fourteenth Amendments were not violated and that, therefore, the judgment of the Supreme Court of Tennessee should be affirmed.

Respectfully submitted

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